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## REGULATING THE "GIFT OF LIFE"—THE 1987 UNIFORM ANATOMICAL GIFT ACT

*Abstract:* Demand for human transplant organs exceeds the supply. The 1987 Uniform Anatomical Gift Act provides a model for state laws intended to alleviate this shortage. This Comment analyzes these proposed laws in light of their potential impact on, first, the organ shortage and, second, the legal rights of donors and their families. Enactment of the 1987 Uniform Anatomical Gift Act can increase organ donation in Washington while intruding minimally on family and physician control of the donation process.

Organ transplants are treatment for a growing number of diseases.<sup>1</sup> As medical science rapidly increases the success of transplantation, demand for organs is likewise increasing.<sup>2</sup> As a result, a significant shortage of transplant organs exists.<sup>3</sup> An estimated 21,000 people in the United States are on transplant waiting lists.<sup>4</sup> In Washington State, a patient might wait six months for a cornea<sup>5</sup> or several years for a kidney.<sup>6</sup> A person in need of a heart might not survive that wait.<sup>7</sup>

In 1987, responding to continued concern about the organ shortage, the National Conference of Commissioners on Uniform State Laws (NCCUSL)<sup>8</sup> drafted a new Uniform Anatomical Gift Act

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1. In addition to transplantation of hearts, livers and kidneys, there is increasing success with heart-lung, pancreas, and bone marrow transplants. G. CERILLI, *ORGAN TRANSPLANTATION AND REPLACEMENT* 10-11 (1988). Transplantation of multiple abdominal organs also has been performed as treatment for cancer. *Seattle Times*, Feb. 11, 1989, at A2, col. 1.

2. McDonald, *The National Organ Procurement and Transplantation Network*, 259 J. A.M.A. 725 (1988). Rapid advances in immunology are improving the results of transplantation, providing the means to overcome the body's rejection of a transplanted organ. Once rejection can be consistently prevented, the medical applicability of transplantation will be unlimited. G. CERILLI, *supra* note 1, at 29.

3. Schwindt & Vining, *Proposal for a Future Delivery Market for Transplant Organs*, 11 J. HEALTH POL. POL'Y & LAW 483, 484 (1986). Statistical studies present various estimates of organ demand. However, these studies uniformly reveal that demand exceeds supply. *Id.*

4. National Kidney Foundation, *KIDNEY* '89, Mar.-Apr. 1989, at 5.

5. Interview with Donna Oiland, Director of the Lions Eye Bank, in Seattle, Wa. (Mar. 21, 1989) (notes on file with *Washington Law Review*).

6. Interview with Karyn Keen-Denton, Manager of the Northwest Organ Procurement Agency, in Seattle, Wa. (Mar. 23, 1989) (notes on file with *Washington Law Review*).

7. Each year an estimated 15,000 people who might benefit from heart replacement die. Evans & Yagi, *Social and Medical Considerations Affecting Selection of Transplant Recipients*, in *HUMAN ORGAN TRANSPLANTATION* 27-28 (1987).

8. The National Conference of Commissioners on Uniform State Laws (NCCUSL) was organized in 1892 to promote uniformity of state law. The NCCUSL is composed of members

(UAGA).<sup>9</sup> The Act is a model for revising state laws on organ donation and will be presented for adoption in Washington State. If adopted, it would modify existing Washington law by prohibiting commercial transactions in cadaveric organs.<sup>10</sup> It also would simplify and clarify the authorization to retrieve organs<sup>11</sup> and require medical and emergency personnel to routinely identify potential donors.<sup>12</sup>

This Comment's discussion of the 1987 UAGA's proposed changes focuses on two issues: one, whether the provisions will effectively increase the supply of transplant organs, and two, whether the provisions impermissibly alter legally recognized rights of parties in the organ donation process. State prohibition of commercial transactions in organs will foreclose options to increase organ supply as it limits individual rights to sell body parts. Nevertheless, the benefits of an exclusively altruistic system of organ recovery warrant foregoing this potential source and limiting individual rights to sell organs. The 1987 UAGA provisions that simplify and clarify authorization to retrieve organs and require routine hospital inquiry about donation should increase organ retrieval. Reducing traditional family and physician control of the donation process aids in realizing the potential increase. The state's interest in promoting organ retrieval justifies this restriction of family rights and physician prerogative.

## I. EXISTING ORGAN RETRIEVAL LAW

### A. *The State Law Foundation*

State laws comprise the majority of laws controlling organ donation. The efforts of the NCCUSL, which promulgated the first UAGA in 1968, led to relative uniformity from state to state.<sup>13</sup> By 1973, all states had adopted the main provisions of the UAGA.<sup>14</sup>

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from all states. It drafts models for state law, which members then introduce to their respective state legislatures. L. FRIEDMAN, A HISTORY OF AMERICAN LAW 564 (1973).

9. UNIF. ANATOMICAL GIFT ACT (1987), 8A U.L.A. 2 (Supp. 1988).

10. *Id.* § 10; *see infra* notes 50-53, 79-83 and accompanying text. Cadaveric organs are organs retrieved from corpses.

11. UNIF. ANATOMICAL GIFT ACT (1987) §§ 2, 4; *see infra* notes 98-100, 110-11 and accompanying text.

12. UNIF. ANATOMICAL GIFT ACT (1987) § 5; *see infra* notes 130-35 and accompanying text.

13. UNIF. ANATOMICAL GIFT ACT, 8A U.L.A. 15 (1983) (amended 1987) [hereinafter 1968 UNIF. ANATOMICAL GIFT ACT]; *see also* Best, *Transfers of Bodies and Body Parts Under the Uniform Anatomical Gift Act*, 15 REAL PROP. PROB. & TR. J. 806 (1980).

14. 1968 UNIF. ANATOMICAL GIFT ACT, *supra* note 13.

## Uniform Anatomical Gift Act

Washington's Anatomical Gift Act follows the 1968 UAGA provisions closely.<sup>15</sup> Under Washington law, individuals may donate their organs for transplantation after death.<sup>16</sup> The donor effectuates this gift by will or other witnessed document.<sup>17</sup> The Washington state driver's license can act as an organ donor document.<sup>18</sup> In the absence of contrary intent by the decedent, the statute designates a prioritized list of survivors authorized to consent to donation.<sup>19</sup> Good faith compliance with the law provides immunity from civil or criminal liability.<sup>20</sup>

In 1987, the Washington Anatomical Gift Act was amended.<sup>21</sup> Washington's statute now requires hospitals to establish procedures to identify potential organ donors.<sup>22</sup> Two additional state statutes, not part of the Anatomical Gift Act, also address organ retrieval for transplantation. A medical examiner, with jurisdiction over a body, may donate either corneas or the pituitary gland from the body.<sup>23</sup>

There are no reported Washington cases by which to interpret either the Washington Anatomical Gift Act or the medical examiner statutes. Similar statutes in other jurisdictions have been upheld,<sup>24</sup> although there are few reported challenges. This lack of litigation leaves unanswered many questions about the scope of existing law.<sup>25</sup>

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15. WASH. REV. CODE §§ 68.50.340–.510 (1989).

16. *Id.* § 68.50.350(1).

17. *Id.* § 68.50.370. The gift is effective when the testator dies, without waiting for probate. Delivery of the gift document during the donor's lifetime is not necessary to make the gift valid. *Id.*

18. *Id.* §§ 46.20.113, 68.50.370.

19. WASH. REV. CODE § 68.50.350 (1989). Authorized survivors are prioritized as follows: spouse, adult child, parent, adult sibling, legal guardian, any other person authorized to dispose of the body. *Id.*

20. *Id.* § 68.50.400.

21. An Act Relating to Anatomical Donations, ch. 129, 1986 Wash. Laws 431 (codified as amended at WASH. REV. CODE §§ 68.50.500–.510 (1989)).

22. WASH. REV. CODE § 68.50.500 (1989); *see also infra* notes 131–32 and accompanying text.

23. WASH. REV. CODE § 68.50.106 (1989) (pituitary glands may be removed and utilized); *id.* § 68.50.280 (corneal tissue for transplantation).

24. *Florida v. Powell*, 497 So. 2d 1188 (Fla. 1986) (statute authorizing medical examiners to remove corneal tissue without notifying decedent's next-of-kin held constitutional), *cert. denied*, 481 U.S. 1059 (1987); *Georgia Lions Eye Bank v. Lavant*, 255 Ga. 60, 335 S.E.2d 127 (1985) (statute authorizing corneal removal upheld), *cert. denied*, 475 U.S. 1084 (1986); *Nicoletta v. Rochester Eye & Human Parts Bank*, 136 Misc. 2d 1065, 519 N.Y.S.2d 928 (1987) (good faith compliance with UAGA provides immunity to hospital and eye bank retrieving eyes); *Williams v. Hoffman*, 66 Wis. 2d 145, 223 N.W.2d 844 (1974) (UAGA's affirmative "good faith" defense upheld against next-of-kin complaint of mutilation of a corpse).

25. The full authority of organ retrieval laws may not be generally exercised by hospitals and physicians, who avoid retrieving organs under circumstances that might give rise to litigation.

Public policy underlying existing organ donor law thus provides the most useful criteria for judging proposed changes.

Although the legislative history of Washington's Anatomical Gift Act reveals no explicitly stated purpose, the 1968 UAGA was the model for the Washington Act.<sup>26</sup> Furthermore, Washington law must be construed to achieve uniformity with other state laws enacting the UAGA.<sup>27</sup> Thus, there is strong support for assuming that the policies underlying Washington law parallel those stated in the 1968 UAGA: encouragement of organ donation and respect for socially and culturally established rights of those affected by the organ retrieval process.<sup>28</sup>

### *B. Congress Responds to the Organ Shortage Crisis*

State enactment of the 1968 UAGA did not decrease the organ deficit. Two events in the early 1980's prompted congressional attention to the problem. One was a series of public appeals by desperate families seeking organs and financial assistance for transplants.<sup>29</sup> The other was the appearance of a commercial market for transplant organs.<sup>30</sup> Congress responded with the National Organ Transplant Act of 1984.<sup>31</sup> The National Organ Transplant Act addressed the need to research issues underlying transplantation and to support existing non-governmental efforts to reduce the current organ

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Lee & Kissner, *Organ Donation and the Uniform Anatomical Gift Act*, 100 SURGERY 867, 868-71 (1986); see *infra* notes 112-18 and accompanying text.

26. See *supra* notes 15-20 and accompanying text.

27. WASH. REV. CODE § 68.50.410 (1989).

28. 1968 UNIF. ANATOMICAL GIFT ACT, *supra* note 13. The preface to the 1968 UAGA states:

Wherever adopted . . . [the 1968 UAGA] will encourage the making of anatomical gifts, thus facilitating therapy involving such procedures. When generally adopted, . . . uncertainty as to the applicable law will be eliminated and all parties will be protected. At the same time the Act will serve the needs of the several conflicting interests in a manner consistent with prevailing customs and desires in this country respecting dignified disposition of dead bodies.

*Id.*

29. National Organ Transplant Act, Pub. L. No. 98-507, 1984 U.S. CODE CONG. & ADMIN. NEWS (98 Stat.) 3975, 3977. President Reagan publicized the plight of a young child needing a liver transplant in one of his radio broadcasts. *Id.*

30. In 1983, Dr. H. B. Jacobs established International Kidney Exchange Ltd., a Virginia corporation, to broker inter vivos sales of kidneys. A person who needed a transplant could purchase the organ for "cost" plus the corporation's "finders fee." Dr. Jacobs anticipated receiving some of his corporation's kidneys from willing residents of Third World countries. Wash. Post, Sept. 19, 1983, at A9, col. 1.

31. National Organ Transplant Act, Pub. L. No. 98-507, 98 Stat. 2339, 2344-47 (1984) (codified at 42 U.S.C. §§ 273-274e (Supp. IV 1986)).

shortage.<sup>32</sup> To pursue the study of issues, Congress created a National Task Force.<sup>33</sup> The first Task Force report recommended creating a national organ sharing system to support existing private organ procurement agencies.<sup>34</sup> To stop the emerging commercial market, the Act criminalized interstate commercial transactions in organs.<sup>35</sup> Subsequent National Task Force recommendations prompted additional federal legislation in 1987.<sup>36</sup> Congress amended the Social Security Act to require hospitals participating in Medicare or Medicaid to have written procedures to make families of potential donors aware of the option of organ donation.<sup>37</sup> The impact of these federal laws on the organ supply is still being evaluated.<sup>38</sup>

C. *A New Anatomical Gift Act—The 1987 UAGA*

The continued severity of the organ shortage also raised questions about the effectiveness of existing state law.<sup>39</sup> In response, the NCCUSL drafted a new UAGA in 1987. This new UAGA is a model

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32. *Id.* at 2339; see also Cotton & Sandler, *The Regulation of Organ Procurement and Transplantation in the United States*, 7 J. LEGAL MED. 55, 57–58 (1986).

33. National Organ Transplant Act, *supra* note 31, at 2339. The first National Task Force report was issued in 1985. See National Task Force on Organ Transplantation, *Executive Summary of the Report of the National Task Force on Organ Transplantation*, reprinted in HUMAN ORGAN TRANSPLANTATION 389, 390 (1987).

34. National Organ Transplant Act, *supra* note 31, at 2344. The Organ Procurement and Transplantation Network established a national system to match organs and recipients. *Id.* The United Network of Organ Sharing, a nonprofit corporation, received the federal contract to develop and maintain the national, computerized system. McDonald, *supra* note 2, at 726. Membership in the network is mandatory for certified organ procurement agencies. 42 U.S.C. § 1320b-8(b) (Supp. IV 1986).

35. National Organ Transplant Act, *supra* note 31, at 2346–7. Federal statute provides: “It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce.” 42 U.S.C. § 274e (Supp. IV 1986).

36. Budget Reconciliation Act, Pub. L. No. 99-509, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 3607, 3669.

37. 42 U.S.C. § 1320b-8 (Supp. IV 1986). The tie to funding sources effectively brings all hospitals within the statute, because virtually all hospitals treat Medicare or Medicaid patients. See generally *infra* notes 128–33 and accompanying text (discussing laws requiring inquiry about donation).

38. Andersen & Fox, *The Impact of Routine Inquiry Laws on Organ Donation*, HEALTH AFF., Winter 1988, at 65; see also *infra* notes 137–38 and accompanying text.

39. UNIF. ANATOMICAL GIFT ACT (1987), prefatory note, 8A U.L.A. 2 (Supp. 1987); Comment, *Organ Transplantation Crisis: Should the Deficit Be Eliminated Through Inter Vivos Sales?*, 17 AKRON L. REV. 283, 287–88 (1983); cf. Lee & Kissner, *supra* note 25, at 874 (state laws are adequate but not fully utilized).

for state legislation aimed at increasing organ donation<sup>40</sup> through provisions that prohibit sale of organs at death,<sup>41</sup> reduce formalities of executing the donative document,<sup>42</sup> prioritize donor consent over family objection,<sup>43</sup> and allow medical examiners to release any useable organ for transplantation according to procedures established by state law.<sup>44</sup> The 1987 UAGA also requires hospital personnel to ask patients about donation routinely, on or before hospital admission.<sup>45</sup>

#### D. State Response to the 1987 UAGA

Unlike the 1968 UAGA, which was swiftly embraced by state legislatures,<sup>46</sup> the 1987 UAGA has met significant opposition. By July, 1989, only six states had adopted the Uniform Act.<sup>47</sup> Debate centers on both the authorization and consent provisions and the routine inquiry requirement.<sup>48</sup> Provisions prohibiting organ sale also have been criticized.<sup>49</sup> This debate raises issues the Washington legislature must address as it considers adopting the 1987 UAGA. Analysis of the proposed provisions and alternative solutions to the organ shortage will aid the legislature in this task.

## II. PROHIBITING SALE OF TRANSPLANT ORGANS

In the early days of transplantation in the United States, organs were provided through an altruistic system of voluntary donation.<sup>50</sup>

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40. UNIF. ANATOMICAL GIFT ACT (1987), *supra* note 39.

41. UNIF. ANATOMICAL GIFT ACT (1987) § 10. Unlike federal law, the 1987 UAGA does not attempt to govern *intervivos* sales. *Id.*; see *infra* notes 58–61, 96 and accompanying text.

42. UNIF. ANATOMICAL GIFT ACT (1987) § 2; see *infra* notes 102–08 and accompanying text.

43. UNIF. ANATOMICAL GIFT ACT (1987) § 2(h); see *infra* notes 110–11 and accompanying text.

44. UNIF. ANATOMICAL GIFT ACT (1987) § 4. See *infra* note 101 and accompanying text.

45. UNIF. ANATOMICAL GIFT ACT (1987) § 5. This is in addition to such inquiry of the family at or near the time of death. See *infra* notes 128–45 and accompanying text.

46. Cotton & Sandler, *supra* note 32, at 60. State enactment of the 1968 UAGA was the most prompt in the experience of the NCCUSL. *Id.*

47. Arkansas, California, Connecticut, Hawaii, Idaho, and North Dakota adopted major portions of the 1987 UAGA. Telephone interview with John McCabe, Uniform Law Commission Legislative Director (June 6, 1989) (notes on file with *Washington Law Review*).

48. American Council on Transplantation, News Release (Oct. 17, 1988); see also Uniform Law Commission, *The Anatomical Gift Act Debate*, UNIFORM ACTIVITIES, Fall 1988, at 6–7.

49. See *infra* notes 54–63 and accompanying text.

50. Kidneys were the first organs successfully transplanted in significant numbers of patients. The first kidney transplants involved organs from living donors, primarily family members. Caplan, *Sounding Board: Ethical and Policy Issues in the Procurement of Cadaver Organs for Transplantation*, in *HUMAN ORGAN TRANSPLANTATION* 272, 273 (1987). The gift relationship, logically assumed in the family context, was incorporated into the first organ donor law, the 1968 UAGA. See *supra* notes 13–17 and accompanying text. Today, however, less than one third of

However, the shortage of organs for transplantation, and the life-or-death circumstances of many awaiting transplant, creates opportunity for financial profit.<sup>51</sup> Faced with an emerging organ market, several states enacted legislation prohibiting sale.<sup>52</sup> Congress also responded with legislation criminalizing interstate commercial transactions in transplant organs.<sup>53</sup>

### A. *Organs As a Commercial Commodity*

State and federal prohibitions against organ sales are criticized for intruding upon individual property rights.<sup>54</sup> Many biotechnology products are derived from human tissue.<sup>55</sup> These products are increasingly profitable.<sup>56</sup> A broad ban on sale arguably deprives an individual of property rights in valuable body parts.<sup>57</sup>

Unlike some state laws, however, federal law and the 1987 UAGA address only organs for "transplantation or therapy."<sup>58</sup> Arguably, these prohibitions would not apply to the sale of organs for use in product development.<sup>59</sup> Further, the 1987 UAGA addresses only market transactions designed to occur after death.<sup>60</sup> This narrow prohibition avoids the more difficult questions of inter vivos sale of non-essential organs or renewable tissue.<sup>61</sup>

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kidney transplants in the United States involve living related donors. Bay & Hebert, *The Living Donor in Kidney Transplantation*, in *ORGAN TRANSPLANTATION AND REPLACEMENT* 273 (G. Cerilli ed. 1988).

51. See *supra* note 30 (describing a proposed international kidney market). The Northwest Organ Procurement Agency reports receiving inquiries from parties interested in selling organs. Interview with Karyn Keen-Denton, *supra* note 6.

52. Comment, *Regulating the Sale of Human Organs*, 71 VA. L. REV. 1015, 1026-1029 (1985).

53. 42 U.S.C. § 274e (Supp. IV 1986); see also *supra* note 35.

54. Comment, *Toward the Right of Commerciality: Recognizing Property Rights in the Commercial Value of Human Tissue*, 34 UCLA L. REV. 207 (1986).

55. *Id.* at 210-11.

56. A California plaintiff was held to have a cause of action in conversion against a pharmaceutical corporation which used portions of the patient's therapeutically removed spleen to develop a marketable cell-line allegedly valued at over three billion dollars. *Moore v. Regents of Univ. of Cal.*, 202 Cal. App. 3d 1230, 249 Cal. Rptr. 494, *review granted*, 252 Cal. Rptr. 816, 763 P.2d 479 (1988).

57. Comment, *supra* note 54, at 214-223.

58. 42 U.S.C. § 274e (Supp. IV 1986); see also *supra* note 35.

59. A market for human organs in product development might draw from the pool of transplant organ donors, thus decreasing the number of transplant organs. Comment, *supra* note 54, at 236-37. This possibility supports banning all organ sale as a necessary means of preserving donation for transplantation. *Id.*

60. UNIF. ANATOMICAL GIFT ACT (1987) § 10.

61. Kidneys are examples of non-essential organs. Each person has two kidneys, but one healthy kidney can assume the function normally performed by two. S. JACOB, C. FRANCONI &



Aside from constitutional questions of property rights, these statutes may foreclose too hastily an avenue for alleviating the organ shortage. Financial incentives are powerful motivators. Remuneration for organs should not be summarily dismissed as an option to increase organ supply.<sup>62</sup> Compensation could take many forms, including payment of the decedent's hospital bills or giving family members priority should any of them need an organ.<sup>63</sup> An altruistic system of uncompensated donors has not supplied enough organs. Other factors must underly lawmakers' persistence in maintaining this system.

### *B. Benefits of Giving Organs: The Altruistic Motive*

Proponents of an altruistic system of organ recovery identify social benefits of the process of donation. Organ donation affirms socially valued human interactions.<sup>64</sup> The donor's experience in enhancing or saving another's life brings the social community together. In contrast, opportunity for financial gain may create family conflict over disposition of organs. If organs are items of monetary value to the next of kin, a person might either feel unduly coerced to sell, or fear that the next of kin would not request all life-saving efforts.<sup>65</sup> One also can criticize the unfairness of a market system of organ allocation. Access to life-saving resources should not be restricted by individual financial ability to purchase organs.<sup>66</sup> The social benefits of voluntary donation, therefore, extend beyond the mere number of retrieved organs.

### *C. Coexistence of Market and Altruistic Systems?*

Commercial and altruistic systems of organ retrieval need not be mutually exclusive. Although adherents to the domino theory of economics assume that once something is a salable commodity, the market will dominate,<sup>67</sup> both market and non-market interactions in some

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W. LOSSOW, *STRUCTURE AND FUNCTION IN MAN* 525 (5th ed. 1982). Examples of renewable tissue are blood, sperm, and ova.

62. Comment, *supra* note 39, at 302.

63. Dukeminier, *Supplying Organs For Transplantation*, 68 MICH. L. REV. 811, 848 (1970).

64. R. TITMUSS, *THE GIFT RELATIONSHIP* 71-75 (1972).

65. Dukeminier, *supra* note 63, at 865.

66. Eliminating unfairness in organ allocation will not ensure equal access to transplantation. Some transplant centers refuse patients who do not have the resources to pay for the surgery. Caplan, *Obtaining and Allocating Organs for Transplantation*, in *HUMAN ORGAN TRANSPLANTATION* 5, 6 (1987).

67. M. Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1913-14 (1987).

commodities coexist.<sup>68</sup> This coexistence, and the problems that result, is illustrated by the system for procuring human blood. Both sellers and donors contribute to the blood supply;<sup>69</sup> yet, acute shortages of blood continue to occur.<sup>70</sup> Moreover, use of paid donors may compromise the quality of the blood supply.<sup>71</sup> Commentators assert that blood from paid donors is more likely to be contaminated than blood from voluntary donors.<sup>72</sup> Thus, paying blood donors does not ensure an adequate supply but potentially undermines the quality of that supply.

Obtaining transplant organs presents many of the same quality and supply issues as obtaining blood. Lessons learned from blood procurement can be applied to organ recovery. The social benefits and increased quality control of a purely altruistic system support excluding paid donors.

A publicly operated transplant organ market is one proposed compromise, incorporating the benefits of financial incentives with those of the current altruistic system.<sup>73</sup> Under such a plan, the government could contract for the future delivery of organs upon the death of a seller. Various forms of compensation are possible, including non-monetary forms such as tax deductions,<sup>74</sup> preferential access to organs for the donor's family, or discounts on medical insurance.<sup>75</sup> Public control of the market allows regulation of organ quality as well as fair allocation to potential organ recipients.<sup>76</sup> Of course, sellers will want a fair price. In setting prices, the system must predict future demand and the probability of delivery of a useable organ. Administrative costs of such a program may be prohibitive, especially when compared

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68. *Id.* at 1915.

69. R. TITMUSS, *supra* note 64, at 96; Comment, *Liability for Transfusion-Transmitted Disease*, 14 WM. MITCHELL L. REV. 141, 144 (1988).

70. R. TITMUSS, *supra* note 64, at 64–67.

71. *Id.* at 142–148.

72. Studies from the 1960's showed the risk of a recipient contracting hepatitis from a blood transfusion was higher when commercially supplied, rather than donated, blood was transfused. *Id.* AIDS, like hepatitis, can be transmitted through blood transfusions. Comment, *supra* note 69, at 142. Although screening tests for these diseases are now available, their effectiveness is limited. *Id.* at 150. Thus, some commentators argue that using blood from paid donors increases the risk of transmission of these viruses. *Id.* at 145.

73. Schwindt & Vining, *supra* note 3, at 483.

74. Comment, *Tax Consequences of Transfers of Bodily Parts*, 73 COLUM. L. REV. 842, 857 (1973).

75. Schwindt & Vining, *supra* note 3, at 495–96. Payment could be made to the donor's choice of charity, thus reinforcing the altruistic nature of the transaction. *Id.*

76. See *supra* notes 66, 71–72 and accompanying text.

to the current system which is primarily private.<sup>77</sup> Congressional policy, as expressed in the National Organ Transplant Act, does not advocate such increased public expenditures.

However theoretically persuasive the arguments for an organ market might be, federal law currently prohibits commercial transactions. The altruistic system prevails on a national level. The 1987 UAGA supports this social policy and would reinforce it through state law.

#### *D. Organ Sale in Washington*

Washington law defines eligible donees of transplant organs. These include hospitals, other entities which employ a physician full-time, and any specified individual needing therapy or transplantation.<sup>78</sup> The statute does not prohibit a donee from reimbursing the donor's estate or family.<sup>79</sup> However, using paid blood or organ donors is discouraged under Washington law.<sup>80</sup> Statute provides limited immunity from implied warranties and civil liabilities to suppliers obtaining blood or organs from voluntary donors. Organs from compensated donors are specifically excluded from the statute's immunity.<sup>81</sup>

Even without state prohibition of organ sale, market options may not exist. Federal law controls most of the internal organs retrieved in Washington through the national organ procurement network.<sup>82</sup> Even purely local organ transactions, outside the auspices of the national network, may be held to affect interstate commerce.<sup>83</sup> The broad reach of the federal statute may sufficiently prohibit a commercial market. However, Washington can reinforce the effect of the federal ban by adopting the 1987 UAGA provision.<sup>84</sup>

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77. See *supra* note 34 (discussing the private corporation operating the national network).

78. WASH. REV. CODE § 68.50.360(1)(d) (1989).

79. Although the statute consistently uses the word *gift* in reference to body parts, arguably the authority to give does not preclude sale, as both concepts assume property rights in the body part. Indeed, one court held that the Uniform Anatomical Gift Act created property rights in the body not previously recognized under common law. *In re Moyer*, 577 P.2d 108 (Utah 1978).

80. WASH. REV. CODE § 70.54.120 (1989).

81. *Id.*

82. Certified organ procurement agencies coordinate organ retrieval and allocation in Washington State. These agencies are members of the United Network of Organ Sharing and share organs nationally through a computerized system. Interview with Karyn Keen-Denton, *supra* note 6. Therefore, these organs are in interstate commerce and controlled by the federal statute prohibiting sale or purchase. See *supra* note 35.

83. Congressional power to control activities that affect interstate commerce allows prohibition of activities occurring exclusively within one state, if those activities might cumulatively affect interstate commerce. *Wickard v. Filburn*, 317 U.S. 111 (1942) (federal control of farmer's grain production extends to wheat grown for home consumption).

84. Washington's statutory definition of *part* differs from that of the 1987 UAGA by including artificial organs, such as pacemakers, as parts governed by its Anatomical Gift Act.

Academic arguments for a commercial organ market are unlikely to change public aversion to the idea of selling body parts to persons in desperate need. The present altruistic system offers social benefits that outweigh the speculative increase in organ supply promised by adding financial incentives. Consistent with this sentiment, Washington should adopt the 1987 UAGA provision banning sale.

### III. AUTHORIZATION & CONSENT TO ORGAN RETRIEVAL

An individual's attitude toward organ donation may differ from that of family members. Washington law states that survivors may not authorize organ retrieval if the decedent was known to object.<sup>85</sup> The law is silent, however, as to the family's veto power over a valid donor document. The 1987 UAGA explicitly prioritizes donor consent over family wishes.<sup>86</sup> Proponents of this provision assert the potential increase in donations justifies alteration of rights traditionally afforded decedents' families.

#### A. *Controlling Disposition of Bodies*

Under common law, a decedent held no "property" right supporting testamentary disposition of his or her body.<sup>87</sup> Laws such as the 1968 UAGA arguably created a limited property right by allowing for donation after death.<sup>88</sup> In contrast, the rights of the decedent's family historically have been acknowledged.<sup>89</sup> These rights relate only to burial, creating liability for interfering with dead bodies.<sup>90</sup> Modern courts developed the concept of a "quasi-property right" to characterize the interest of relatives in the bodies of their next of kin.<sup>91</sup>

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WASH. REV. CODE § 68.50.340(5) (1989). The legislature should consider whether sale of artificial organs should be distinguished from sale of "natural" body parts. Although recycling of pacemakers is not accepted medical practice due to risk of infection, European trade in these devices has been reported. R. SCOTT, *THE BODY AS PROPERTY* 180 (1981).

85. WASH. REV. CODE § 68.50.350(2) (1989).

86. UNIF. ANATOMICAL GIFT ACT (1987) § 2(h).

87. *Williams v. Williams*, 20 Ch. D. 659, 665 (1882), noted in Matthews, *Whose Body? People As Property*, 36 CURRENT LEGAL PROBS. 191, 210 (1983).

88. *In re Moyer*, 577 P.2d 108 (Utah 1978).

89. RESTATEMENT (SECOND) OF TORTS § 868 (1977). "One who intentionally, recklessly or negligently removes, withholds, mutilates or operates upon the body of a dead person or prevents its proper interment or cremation is subject to liability to a member of the family of the deceased who is entitled to the disposition of the body." *Id.*

90. *Id.*

91. *Georgia Lions Eye Bank v. Lavant*, 255 Ga. 60, 335 S.E.2d 127 (1985), cert. denied, 475 U.S. 1084 (1986).

Washington courts have recognized this right.<sup>92</sup> As a legal concept, these "quasi-property rights" are criticized.<sup>93</sup> However, their judicial recognition reinforces the social norm of respecting family wishes.

However one characterizes the rights of the decedent or family, Washington, like other states, subordinates these rights to state interests such as detecting crime or protecting public health. Washington law allows the coroner or medical examiner to perform an autopsy when death is from violent or suspicious causes.<sup>94</sup> State law also places limitations on how and where bodies may be buried.<sup>95</sup> Although there are no reported challenges to Washington's statutes, courts in other jurisdictions have uniformly upheld similar statutes.<sup>96</sup> The 1987 UAGA provisions are no more intrusive on traditional family rights than existing state law controlling the disposition of bodies.

### B. Donor Versus Family Consent

Washington's Anatomical Gift Act recognizes rights of both the decedent and family to donate the decedent's body after death.<sup>97</sup> The changes proposed by the 1987 UAGA to existing Washington law include: one, eliminating the witnessing requirement for the donative document;<sup>98</sup> two, specifying that donor consent overrides family objection to donation;<sup>99</sup> and three, allowing medical examiners to release any useable organ for transplantation according to state law procedures.<sup>100</sup> The provision for medical examiners is unlikely to affect organ retrieval in Washington.<sup>101</sup> Therefore, the primary effect of the

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92. *Guillume v. McCulloch*, 173 Wash. 694, 24 P.2d 93 (1933); *Herzl Congregation v. Robinson*, 142 Wash. 469, 253 P. 654 (1927).

93. PROSSER AND KEETON ON THE LAW OF TORTS § 12, at 63 (W. Keeton 5th ed. 1984). "It seems reasonably obvious that such 'property' is something evolved out of thin air to meet the occasion, and that in reality the personal feelings of the survivors are being protected, under a fiction likely to deceive no one but a lawyer." *Id.*

94. WASH. REV. CODE § 68.50.010 (1989) (establishing coroner's jurisdiction over remains).

95. *Id.* § 68.50.130 (making unlawful disposal of remains a misdemeanor); *id.* § 68.50.135 (permitting burial on island solely owned by individual).

96. *Dukeminier*, *supra* note 63, at 832.

97. WASH. REV. CODE § 68.50.350 (1989); *see also supra* notes 16-19 and accompanying text.

98. UNIF. ANATOMICAL GIFT ACT (1987) § 2(b).

99. *Id.* § 2(h).

100. *Id.* § 4.

101. Corneas and pituitary glands are already retrievable under Washington law. WASH. REV. CODE §§ 68.50.106, .280 (1989). Vascularized organs, such as hearts, livers and kidneys, deteriorate rapidly after cessation of the heartbeat. If not removed and cooled within sixty minutes, they are unsuitable for transplantation. Callender, *Legal and Ethical Issues Surrounding Transplantation: The Transplant Team Perspective*, in HUMAN ORGAN TRANSPLANTATION 42 (1987).

1987 UAGA provisions would be to strengthen donor control and provide the family less power to object.

### 1. *Witnessing Donor Documents*

A majority of the population approves of organ donation, yet few individuals complete organ donor cards.<sup>102</sup> Washington law requires an organ donor document to be "signed by the donor in the presence of two witnesses who must sign the document in his presence."<sup>103</sup> If the formality of this procedure were removed, it would be easier to complete a donor card. The number of valid card-carrying donors might increase.

Surveys of attitudes toward organ donation do not identify the witnessing formality as a barrier to completion of donor cards.<sup>104</sup> Psychological factors more plausibly explain this hesitancy.<sup>105</sup> Many individuals find it difficult to confront the reality of death.<sup>106</sup> More specifically, people fear that indicating willingness to donate organs may compromise efforts to save their lives.<sup>107</sup> Further, personal religious beliefs may be obstacles to donation.<sup>108</sup> However, for the person without psychological resistance, a simple procedure for completing donor cards will increase the likelihood he or she will validly complete the document. The 1987 UAGA provision appropriately addresses that category of potential donor.

### 2. *Family Consent to Organ Retrieval*

Donor documents may not play a significant role in the retrieval process. When a donor document is completed, the 1968 UAGA and similar state statutes delineate clearly that the document is valid authorization; yet, only four states routinely salvage organs without family consent, despite valid organ donor documentation.<sup>109</sup> The

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102. A Gallup Poll reported that almost 75% of persons surveyed approved of organ donation, yet only 17% had completed donor cards. Task Force on Organ Transplantation, *Organ Transplantation: Issues and Recommendations* (1986), quoted in UNIF. ANATOMICAL GIFT ACT (1987), *supra* note 39; Parisi & Katz, *Attitudes Toward Posthumous Organ Donation and Commitment to Donate*, 5 HEALTH PSYCHOLOGY 565, 566 (1986).

103. WASH. REV. CODE § 68.50.370(2) (1989).

104. Parisi & Katz, *supra* note 102, at 566-68.

105. *Id.*; Lee & Kissner, *supra* note 25, at 871.

106. Lee & Kissner, *supra* note 25, at 871. An analogy may be drawn to the large number of persons who never complete wills. Dukeminier, *supra* note 63, at 829-30.

107. Lee & Kissner, *supra* note 25, at 871.

108. *Id.* Most religions in the United States officially sanction organ donation. However, individual religious objections to donation are still cited. *Id.*

109. Overcast, Evans, Bowen, Hoe & Livak, *Problems in the Identification of Potential Organ Donors*, 251 J. A.M.A. 1559, 1561 (1984) [hereinafter Overcast]. A 1983 survey revealed only

1987 UAGA proposes to clarify survivors' responsibility to follow a donor's wishes. Family consent to donation will not be necessary if a valid donor document is available.<sup>110</sup> Under such circumstances, the 1987 UAGA explicitly authorizes physicians and hospitals to retrieve organs without family consent.<sup>111</sup>

Medical personnel are reluctant to retrieve organs absent family consent.<sup>112</sup> Several factors may account for this reluctance. First, the medical community fears litigation by family members.<sup>113</sup> Second, some physicians have moral objections to removing organs without family consent.<sup>114</sup> Third, the transplant community anticipates negative publicity if an organ is removed over family objection.<sup>115</sup> Legislation addresses only the first of these reasons for physician reluctance to retrieve organs. If the law provided stronger immunity from liability,<sup>116</sup> physicians might have more confidence in their legal authority to retrieve. The current immunity, however, has been upheld when challenged.<sup>117</sup> Social and cultural norms, rather than legal uncertainty, more likely influence physician behavior. These norms reinforce respect for family wishes.<sup>118</sup>

Legislation such as the UAGA's provision will not immediately alter physician behavior. Nevertheless, these provisions eliminate ambiguity about the physician's authority relative to family consent, a necessary first step. When combined with the simplified procedure for completing donor cards, the 1987 UAGA's explicit authority to retrieve can increase organ recovery.

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California, Colorado, Florida, and Wyoming took full advantage of the 1968 UAGA provisions, retrieving organs solely on the authority of a donor document. *Id.* at 1561-62.

110. UNIF. ANATOMICAL GIFT ACT (1987) § 2. The 1987 UAGA also directs medical and emergency personnel to search for donor documents. *Id.* § 5.

111. *Id.* § 2.

112. Overcast, *supra* note 109, at 1561.

113. *Id.*

114. *Id.*

115. *Id.* at 1561-62. The Lions Eye Bank in Seattle reports that it seeks family consent when a potential donor is referred from the coroner. The Eye Bank prefers not to utilize the explicit authority of Washington's cornea retrieval statute and risk offense to the public. Interview with Donna Oiland, *supra* note 5.

116. Washington law provides immunity for good faith compliance with its Anatomical Gift Act. WASH. REV. CODE § 68.50.400 (1989).

117. See *supra* notes 24-25 and accompanying text.

118. See *supra* notes 89-93 and accompanying text (discussing legal recognition of family rights).

#### IV. ROUTINE INQUIRY ABOUT DONATION

Although a deceased individual can effectively block donation,<sup>119</sup> the affirmative decision to retrieve organs is controlled by two groups: the medical professionals who identify potential donors and the families of those donors. If legislation can affect the organ shortage, it must be directed at these groups.

##### A. *Increasing Family Consent*

The 1987 UAGA seeks to maximize donation from families who are willing to consent. When asked about donation, seventy-five percent of families give permission.<sup>120</sup> Although the number of potential cadaveric donors each year is difficult to estimate, studies often find that number could provide enough transplant organs to meet or exceed the demand.<sup>121</sup> Under that assumption, if all families of potential donors were asked, at least seventy-five percent of the organ need could be met. A higher retrieval rate may not be feasible under the present system requiring explicit consent to donation. One alternative is to establish a legal presumption of consent to donate.

Several European countries have laws creating "presumed consent."<sup>122</sup> Under this system, physicians are authorized to retrieve organs unless there is known objection by the deceased or his or her immediate family.<sup>123</sup> In the United States, several states have presumed consent laws for removal of corneas.<sup>124</sup> However, the experience of several European countries with presumed consent indicates that physicians often continue to seek family consent before retrieval.<sup>125</sup> Thus, the 1987 UAGA provision mandating routine inquiry about donation pragmatically addresses the goal of maximizing family consent.

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119. WASH. REV. CODE § 68.50.350 (1989) (donation may not be authorized when decedent indicated opposition); *id.* § 68.50.390 (providing for donor's revocation of gift).

120. Prottas, *The Structure and Effectiveness of the U.S. Organ Procurement System*, 22 INQUIRY 365, 375 (1985).

121. Kolata, *Organ Shortage Clouds New Transplant Era*, 221 SCIENCE 32 (1983).

122. Cantaluppi, Scalapogna & Ponticelli, *Legal Aspects of Organ Procurement in Different Countries*, 16 TRANSPLANT PROC. 102 (1984) [hereinafter Cantaluppi]. For example, consent to organ donation is presumed by law in France, Israel, Finland, Italy, and Spain. *Id.* at 102.

123. *Id.*

124. American Medical Association Council on Scientific Affairs, *Report of the Organ Transplant Panel*, 259 J. A.M.A. 719, 720 (1988). For discussion of Washington's cornea removal statute, see *supra* notes 23, 115.

125. Cantaluppi, *supra* note 122, at 102.



### B. Laws Requiring Inquiry About Donation

Assuming public support for organ donation,<sup>126</sup> medical professionals should be encouraged to identify potential donors and ask for consent for retrieval. The most successful organ procurement programs are those that effectively convince staff in intensive care units to consider organ donation at every death.<sup>127</sup>

In 1985, states began enacting laws to encourage hospital personnel to inquire routinely about organ donor status.<sup>128</sup> By 1989, all but five states had routine inquiry laws.<sup>129</sup> Federal law also mandates routine inquiry procedures in hospitals receiving Medicare and Medicaid funds.<sup>130</sup> Washington's routine inquiry statute requires more specific procedures than federal law.<sup>131</sup> Hospital staff must ask the next of kin, at or near the time of death, whether the deceased was an organ donor. If the patient has expressed no objection, the family must be informed of the option to donate.<sup>132</sup> The 1987 UAGA would add a requirement that routine inquiry take place at or near the time of hospital admission.<sup>133</sup> On its face, this requirement seems a minor addition to existing law. However, the provision has been a major focus of debate.<sup>134</sup>

Opponents of routine inquiry at admission offer several arguments. First, the effectiveness of inquiry of the patient at admission is doubtful. A primary source of donor organs is trauma victims, not routine hospital admissions.<sup>135</sup> A second objection is that the public might be

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126. Protas, *supra* note 120, at 375.

127. *Id.* at 365. Success is defined according to a standard that incorporates referrals per capita, permissions per capita, and transplanted kidneys per capita. *Id.* at 370-74.

128. Andersen & Fox, *supra* note 38, at 66.

129. *Id.* State routine inquiry laws vary significantly in enforcement provisions, exceptions allowed, and whether hospitals must request donation or merely inform families of the option. *Id.* at 68.

130. Under federal law, these procedures must:

- (1) assure that families of potential organ donors are made aware of the option of organ or tissue donation and their option to decline,
- (2) encourage discretion and sensitivity with respect to the circumstances, views, and beliefs of such families, and
- (3) require that an organ procurement agency . . . be notified of potential donors;

42 U.S.C. § 1320b-8 (Supp. IV 1986); see also *supra* notes 36-37 and accompanying text.

131. WASH. REV. CODE § 68.50.500 (1989).

132. *Id.*

133. UNIF. ANATOMICAL GIFT ACT (1987) § 5.

134. Uniform Law Commission, *supra* note 48, at 6-7. Groups taking exception to the provision include the Eye Bank Association of America and the United Network for Organ Sharing. *Id.*

135. *Id.* at 6. The drafters of the 1987 UAGA recognized trauma victims as potential donors and would require emergency medical personnel to search for donor cards. UNIF. ANATOMICAL GIFT ACT (1987) § 5, *supra* note 9.

offended by the donation question, resulting in a backfire of resistance.<sup>136</sup> Physicians may be concerned that such a question would undermine the patient's confidence in the doctor, needlessly amplifying fear of surgery or treatment. Unless routine inquiry laws increase donation, these potential problems are not justified.

Routine inquiry statutes were enacted only recently and state provisions vary, making evaluation of their effectiveness difficult.<sup>137</sup> However, one study observed a national consensus that presumptions about the feelings of survivors should not thwart the opportunity to donate organs.<sup>138</sup> Proponents of the 1987 UAGA routine inquiry provision agree. They do not foresee public opposition to being asked about donation.<sup>139</sup> The donation question is like many of the other routine and arguably invasive questions already posed to the patient at hospital admission.<sup>140</sup> Although patient refusal will foreclose the option of organ retrieval under existing law,<sup>141</sup> evidence suggests the majority of persons asked will consent.<sup>142</sup>

Routine inquiry procedures can assist medical personnel in the difficult task of retrieving organs. Requesting donation from a grieving family is emotionally demanding and time consuming.<sup>143</sup> Rewards are rarely direct.<sup>144</sup> Even health care professionals who support organ donation may wish to avoid this situation.<sup>145</sup> Their task would be made easier with prior documentation of a patient's willingness to donate. Washington should expand its routine inquiry statute to

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136. Uniform Law Commission, *supra* note 48, at 6-7.

137. Anderson & Fox, *supra* note 38, at 77. Initial studies of these laws are inconclusive. In 1986, the year following enactment of its required request law, New York reported heart donation increased by 94%, livers by 96%, and kidneys by 23%. In contrast, during a similar time frame with similar state laws, Oregon and California reported an initial increase in donor referrals, followed by a later decline. *Id.* at 75.

138. *Id.* at 77.

139. J. McCabe, *Editorial*, UNIFORM ACTIVITIES, Fall 1988, at 7.

140. UNIF. ANATOMICAL GIFT ACT (1987) § 5 comment.

141. WASH. REV. CODE § 68.50.350 (1989) (survivors may not authorize retrieval if the decedent was known to object).

142. Parisi & Katz, *supra* note 102, at 566.

143. Prottas & Batten, *Health Professionals and Hospital Administrators in Organ Procurement: Attitudes, Reservations, and Their Resolutions*, 78 AM. J. PUB. HEALTH 642, 644 (1988).

144. The medical staff who retrieve an organ are unlikely to see the benefits to the transplant recipient, who may be in another state. *See supra* note 34 (discussing the network for organ sharing). Organ procurement agencies maintain strict confidentiality as to the identity of transplant recipients. Interview with Karyn Keen-Denton, *supra* note 6.

145. Prottas & Batten, *supra* note 143, at 645.

incorporate the 1987 UAGA provision for inquiry at hospital admission. Objections to the provision assume a public resistance that has not been documented.

## V. CONCLUSION

Human organs are increasingly valuable commodities. As such, they are subject to competing claims of the individual, the family, and the potential transplant recipient. The task of mediating among these interests falls on legislatures. The 1987 UAGA offers a viable model for states faced with this challenge.

Washington should adopt the provision prohibiting commerce in transplant organs. State law will then reinforce federal law, reaffirming the value of altruism. Limiting the option to sell organs intrudes minimally on individual rights. Public policy supports the conclusion that this commodity should not carry a price tag.

The provisions designed to facilitate organ donation enhance individual opportunity to donate, while reducing family opportunity to object. These laws should be adopted to increase the number of validly documented donors and increase physician confidence in the authority of donor documents. Family consent may remain pivotal in the decision to retrieve organs, due more to traditional cultural attitudes than legal rights of the family. However, cultural changes can occur more easily when the law is clear. The 1987 UAGA provides that clarity.

Expanding routine inquiry directly confronts larger numbers of persons with the question of donation. This creates individual opportunity not only to consent but also to object. The severity of the organ shortage requires taking the risk of increased refusal. The lessons learned from enactment of the 1987 UAGA will guide future attempts at regulating this valuable and personal resource.

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